

***National Labor Relations Board***  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

May 24, 1993

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United Mine Workers of America,, District 5 and Its Local 1378, (Pennsylvania Mine Corporation), Case 6-CB-8906

536-2535, 536-2581

This Section 8(b)(1)(A) case was submitted for advice as to whether the Union breached its duty of fair representation by not distributing an arbitrator's backpay award to affected employees and instead retaining the award in the Union treasury.

**FACTS**

The Union filed and processed a class action grievance claiming that the Employer had assigned some unit work to supervisors. The Charging Party filed a similar grievance, claiming that supervisors performed work that he should have performed. This grievance was held in abeyance while the class-wide grievance was processed. The arbitrator found specific contractual violations and concluded that employees in certain job classifications, including that of the Charging Party, were entitled to backpay. Pursuant to a stipulation between the Union and the Employer, the arbitrator retained jurisdiction, for 60 days from the date of the award, over the calculation of the backpay and the identification of the employees entitled to the backpay. Thus, if the Union and the Employer could not resolve such questions, either party could return to the arbitrator for his determination of that matter.

District 5 subsequently told the Local Union that it could retain the backpay award in the Local Union treasury, rather than distribute it to employees. The only reason proffered for this decision is an assertion that it would be too difficult to determine which employees were entitled to backpay. The Local and the District also point to prior arbitrations in which they sought, and obtained, awards payable to the Union treasury for the benefit of all members. There is no evidence that the Union asked the arbitrator to exercise his retained jurisdiction to determine the affected employees and amounts of backpay to which they were entitled. Nor is there any allegation that the Union's decision was motivated by animus.

**ACTION**

We conclude that a Section 8(b)(1)(A) complaint should issue, absent settlement, alleging that both the Local Union and District 5 breached their duty of fair representation.

We view the Union's decision to retain the backpay award as arbitrary because of the Union's inexplicable failure to use the method -- a request to the arbitrator to exercise his retained jurisdiction -- created to solve the very problem that the Union asserts justifies its retention of the award. The arbitrator specifically found that individual employees were entitled to backpay and that those employees and the sums they were due were to be identified. Moreover, the Union's reliance on the asserted difficulty of identification is irrelevant because a union's "fiduciary nature connotes some degree of affirmative responsibility with regard to the allocation of benefits the union has secured for the employees in a collective-bargaining agreement." [\(1\)](#) Equally misplaced, in light of the arbitrator's differing decision, is reliance on prior awards that specifically provided for lump sum payments to the Union treasury. Nor is the Union decision in this case like that found lawful in *United Steelworkers of America, Local 2869 (Kaiser Steel Corp.)*, [\(2\)](#) where the union and the employer agreed to distribute an arbitration award on a per capita basis to unit employees at the time of the settlement, thus excluding people who had formerly been members of and had since left the bargaining unit, where the settlement figure "represented a composite loss of the unit as a whole." In the instant case, the arbitrator specifically found the employees in certain identified job classifications, not the unit as a whole,

suffered losses and were to be compensated. [\(3\)](#)

R.E.A.

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<sup>1</sup> General Truck Drivers Local 315 (Rhodes & Jamieson, Ltd., 217 NLRB 616, 617 (1975) (citations omitted).

<sup>2</sup> 239 NLRB 982 (1978).

<sup>3</sup> See also Teamsters Local 101 (Allied Signal Corp.), 308 NLRB No. 25 (1992) (union did not violate Section 8(b)(1)(A) where, after arbitrator awarded backpay to unit employees affected by employer's subcontract, union and employer agreed that part of backpay award should go to other employees who had also lost work because of subcontracting).